FILE COPY

Office Supreme Court, U. S.
FILED
JUL 22 1935
CHARLES ELMORE CROPLEY
CLERK

No. 116

In the Supreme Court of the United States

October Term, 1934.

STATE OF OKLAHOMA, *EX REL.* OKLAHOMA TAX COMMISSION, H. L. McCRACKEN, CHAIRMAN, RAYMOND D. THOMAS AND E. L. RICHARDSON, MEMBERS OF SAID COMMISSION, AND B. B. CONNOR AS SHERIFF OF OSAGE COUNTY, OKLAHOMA, *Petitioners,*

vs.

BARNSDALL REFINERIES, INCORPORATED, THE CARTER OIL COMPANY, CHAMPLIN REFINING COMPANY, *ET AL., Respondents.*

BRIEF OF RESPONDENTS.

EDWARD H. CHANDLER,
JAMES B. DIGGS,
R. W. GARRETT,
WM. H. ZWICK,
L. G. OWEN,
Counsel for Respondents.

JOE DICKERSON,
Of Counsel.

INDEX.

	PAGE
Preliminary statement	1
Argument	7
The Act of 1933 creates an "excise tax" and not a "gross production tax"	7
If the Act of 1933 is a "gross production tax" it is not the kind authorized by Congress	11
(1) There must be only one "gross production tax." Not two or more	13
(2) The tax must be distributed—that is, it must go to several purposes and not to only one	14
(3) The tax must be "in lieu of all other state and county taxes levied upon the production of oil"	18
(4) It must be a per centum tax upon the value of the oil—the equivalent of an ad valorem tax upon the leasehold, equipment and production—not a flat tax per barrel	21
Conclusion	23

CASES.

Flint v. *Stone Tracy Company*, 220 U. S. 108	9
Gypsy Oil Company v. *Oklahoma Tax Commission*, 6 Fed. Supp. 6	24
Howard v. *Oil Companies*, 247 U. S. 503, 62 L. ed. 1239	3, 13
Hunter v. *City of Memphis*, 26 S. W. 828 (Tenn.)	20
Large Oil Company v. *Howard*, 248 U. S. 549, 63 L. ed. 416	3, 13
Shaffer v. *Carter*, 252 U. S. 37	5, 22
Young v. *Sinsabaugh*, 173 N. E. 784 (Ill.)	15

STATUTES.

Act of June 28, 1906 (34 Stat. L. 539)	1
Act of March 3, 1921 (41 Stat. L. 1249)	2, 3, 11-12, 21
Act of March 2, 1929 (45 Stat. L. 1478)	2
Session Laws Oklahoma, 1916, p. 102	3, 4
Session Laws Oklahoma, 1933, p. 301	5, 7, 16, 18

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1934.

No. 116

STATE OF OKLAHOMA, *EX REL.* OKLAHOMA TAX COMMISSION, H. L. McCRACKEN, CHAIRMAN, RAYMOND D. THOMAS AND E. L. RICHARDSON, MEMBERS OF SAID COMMISSION, AND B. B. CONNOR AS SHERIFF OF OSAGE COUNTY, OKLAHOMA, *Petitioners,*

vs.

BARNSDALL REFINERIES, INCORPORATED, THE CARTER OIL COMPANY, CHAMPLIN REFINING COMPANY, *ET AL., Respondents.*

BRIEF *of* RESPONDENTS.

Preliminary Statement.

By Act of Congress of June 28, 1906 (34 St. L. 539), known as the "Osage Allotment Act," provision was made, among other things, for the division of the lands belonging to the Osage Tribe of Indians among the members thereof, but by section 3 of such act the oil, gas and other mineral content in all of the land to be allotted was reserved for the benefit of the Osage Tribe for a period of 25 years and such section provided that leases for oil, gas and other min-

eral, covering the allotted lands might be made by the Osage Tribe of Indians through its Tribal Council and with the approval of the Secretary of the Interior and under such rules and regulations as the Secretary might prescribe. Such section 3 is as follows:

> "*Sec. 3.* That the oil, gas, coal or other minerals covered by the lands for the selection and division of which provision is herein made are hereby reserved to the Osage tribe for a period of twenty-five years from and after the eighth of April, nineteen hundred and six; and leases for all oil, gas and other minerals covered by selections and division of lands herein provided for, may be made by the Osage tribe of Indians through its tribal council, and with the approval of the Secretary of the Interior, and under such rules and regulations as he may prescribe; *provided*, that the royalties to be paid to the Osage tribe under any mineral lease so made shall be determined by the President of the United States; and, *provided further*, that no mining of or prospecting for any of said mineral or minerals shall be permitted on the homestead selections herein provided for without the written consent of the Secretary of the Interior; *provided, however*, that nothing herein contained shall be construed as affecting any valid existing lease or contract."

Other sections of the Osage Allotment Act gave Congress the power to extend the period of the reservation of minerals beyond the 25 years provided in the original act and by Act of Congress approved March 3, 1921 (41 Stat. L. 1249), Congress amended section 3 of the Osage Allotment Act so as to extend the time of the reservation of the minerals to April 8, 1946, and by Act of Congress, approved March 2, 1929 (45 Stat. L. 1478), such reservation of minerals was extended to April 8, 1958.

All oil produced in Osage County by respondents or others is produced under oil leases made pursuant to the above mentioned Acts of Congress and the regulations of the Secretary of the Interior pertaining to such leases. Each lease under which respondents or others are producing oil in Osage County has been made by the Tribal Council and approved by the Secretary of the Interior and the leases are being operated in accordance with the regulations of the Secretary pertaining to such operations.

A "Gross Production Tax" Law was passed by the Extraordinary Session of the Fifth Oklahoma Legislature in 1916 (Session Laws Oklahoma, 1916, p. 102). The gross production taxes levied by this act were attempted to be collected on oil produced pursuant to Osage leases. But in *Howard* v. *Oil Companies,* 247 U. S. 503, 62 L. ed. 1239, and in *Large Oil Company* v. *Howard,* 248 U. S. 549, 63 L. ed. 416, this court held that the law was invalid as applied to Osage production. These cases were decided in 1918 and 1919, respectively. Congress, thereafter, in 1921, passed the act approved March 3, 1921 (41 Stats. at L. 1250), the result of which was to permit the Oklahoma Gross Production Tax Law of 1916 to apply to oil produced from Osage lands. It is evident from the language of the permissive act that in giving this consent, Congress had in mind the particular kind of a gross production tax then in effect in Oklahoma. The Gross Production Tax Congress consented to was to be

> "distributed"

and was to be

> "in lieu of all other state and county taxes levied upon the production of oil and gas"

both to be

> "as provided by the laws of Oklahoma."

With reference to distribution of the tax, the 1916 Act provided, in section 5, as follows:

> "The gross production tax provided for in this act is hereby levied and collected for the following specific purposes, to-wit:
>
> "*(1)* For current expenses of state government: Two-thirds.
>
> "*(2)* For and in aid of the common schools of the county from whence the oil or gas and other mineral is produced, one-sixth (five mills).
>
> "*(3)* For and in aid of the construction of permanent roads and bridges of the county from whence the oil or gas and other mineral is produced, one-sixth (five mills)."

This section has been carried forward unchanged in all codifications of the Oklahoma law and is copied in full in the appendix to petitioners' brief at page 29, as section 12445 of the 1931 Code. The "in lieu" provision was contained in section 1 of the 1916 Act, and was, in so far as pertinent here, as follows:

> "The payment of the taxes herein imposed shall be in full and in lieu of all taxes by the state * * * upon leases for mining * * *; and also upon the oil, gas, asphalt or ores bearing minerals hereinbefore mentioned * * *."

This section has been carried forward in all subsequent codifications of the Oklahoma laws and is copied in full in the appendix to petitioners' brief at page 26, as section 12434 of the 1931 Code. The amount and basis of the tax was provided for in section 1. It was to be

> "equal to 3 per centum of the gross value of the production * * *."

The last paragraph of such section 1 provided that if the

gross production tax so levied was greater or less than the general ad valorem tax for all purposes would be on the property, as to which the tax was an "in lieu" tax, then the State Board of Equalization could raise or lower the rate to make the gross production tax conform to what the ad valorem tax would have been if levied. An appeal was permitted from the action of the State Board of Equalization in this regard to the Supreme Court of the State of Oklahoma. In *Shaffer* v. *Carter,* 252 U. S. 37, this court said that the Oklahoma Gross Production Tax was

"a substitute for the ad valorem property tax * * *,"

and this is quite obvious due to the fact that the rate is to be raised or lowered to make the tax the equivalent of an ad valorem tax.

Since passage of the permissive act of Congress, the Oklahoma Gross Production Tax has been regularly collected upon all oil produced in the Osage Nation.

The 1933 Oklahoma Legislature passed an act (Ch. 132 of the Oklahoma Session Laws 1933, p. 301) which it denominated an "Excise tax." It is this law that is in controversy here. It was held below that this act was invalid as applied to oil produced pursuant to the Osage oil leases, because Congress had not consented to such tax. This act is printed in full in the appendix to petitioners' brief, beginning at page 22, except that the title to the act is omitted. Such title is as follows:

"EXCISE TAX ON PETROLEUM.

House Bill No. 483.

An act levying an Excise Tax of one-eighth of one cent per barrel on petroleum oil produced in the State of Oklahoma subsequent to the passage and approval

of this Act; providing for the deposit of the proceeds of such tax in the State Treasury to the credit of the 'Proration Fund' created hereby, and the appropriation of said fund for the payment of salaries and expenses of the proration umpire, his assistant and deputies, and the proration attorney, and for the payment of salaries and expenses of reporters, stenographers, and clerks, and all items of office expense and supplies, as fixed and authorized by the provisions of House Bill No. 481 of the Acts of the Fourteenth Session of the Legislature of the State of Oklahoma; providing for the time and manner of the payment of said tax by the purchaser or producer; providing for penalties and proceedings on delinquencies, and prescribing penalties for the violation of this act; repealing all acts in conflict herewith, and for other purposes and declaring an emergency."

ARGUMENT.

We will present our argument in support of our contention that Congress has not consented to the "excise tax" on oil produced from the Osage lands, under two propositions, as follows:

(1) The Act of 1933 creates an "excise tax" and not a "gross production tax."

(2) If the Act of 1933 is a "gross production tax" it is not the kind authorized by Congress.

And of these in their order:

I.

The Act of 1933 Creates an "Excise Tax" and Not a "Gross Production Tax."

The title of the "excise tax" act which, under the Constitution of Oklahoma, must disclose the nature and subject of the act, defines it as

> "An Act levying an *excise tax* of one-eighth of one cent per barrel on petroleum oil produced in the State of Oklahoma subsequent to the passage of this Act."

Section 1 of the act declares that until June 30, 1935,

> "there is hereby levied an *excise tax* of one-eighth of one cent per barrel on each and every barrel of oil produced in Oklahoma."

Then such act goes on to state:

> "Such *excise tax* of one-eighth of one cent per barrel shall be reported to and collected by the Oklahoma Tax Commission at the time and in the same manner as now provided by chapter 66, article 5, of the Okla-

homa Session Laws of 1931, for the collection of the *gross production tax* on petroleum oil."

It then goes on to state, "on petroleum sold at the time of production the *excise tax* thereon shall be paid by the purchaser," *et cetera.* It is thus seen that the act itself uses the term "excise tax" many times and an examination of the act discloses that the legislature used the right nomenclature when it so described the act. The very section 1, which uses the words

"excise tax"

three times in speaking of the tax levied thereby, uses such term in juxtaposition to the words

"gross production tax."

But it is said that while the tax is denominated an "excise tax" yet, in truth and in fact, it is a gross production tax and that the court will look through the nomenclature to the realities and declare the tax a production tax. This power, of course, the court has. It is usually exercised in the defense of the jurisdiction of the federal courts where state laws by their wording seek to evade a federal question that would give the courts of the United States jurisdiction. It is apparent that the Oklahoma legislature made no effort to camouflage this tax. It very evidently thought it was an excise tax. If it had had in mind production from Osage land and had intended to attempt to make the tax apply to such production, it would probably have named the tax a gross production tax or an additional gross production tax, or embodied this tax as an amendment to the 1916 gross production tax law. Only a small part of the oil that is produced in Oklahoma comes from Osage lands. All production in the Osage is under the supervision of the

Secretary of the Interior and the proration laws of Oklahoma, to defray the expenses of which the excise tax law was passed, could have no operation in the Osage under existing federal law unless the Secretary of the Interior consented thereto. In view of the decisions of the Supreme Court of Oklahoma and of this court, it is probable that the Oklahoma legislature did not expect that the taxing authorities would claim that the excise tax law was applicable to Osage production. At any rate it is certain that the Oklahoma legislature thought it was correctly describing the 1933 tax when it called it an "excise tax." There is nothing whatever in the act to indicate that the Oklahoma legislature was not in absolute good faith in denominating the tax an "excise tax." The power to disregard nomenclature is not exercised to the extent of changing the nature of a tax imposed as declared by the words of the statute unless it is apparent from the face of the statute that the legislature has made a misapplication of the term. Thus in *Flint* v. *Stone Tracy Company,* 220 U. S. 108, the act described the tax as an "excise tax" but it was contended that the act in truth levied a property tax under the guise of an excise tax and this court should look through the words of the act to its real purpose and intent. Answering this contention, the court on page 145 say:

> "While the mere declaration contained in the statute that it should be regarded as a tax of a particular character does not make it such, if it is apparent that it cannot be so designated consistently with the meaning and effect of the act, *nevertheless the declaration of the lawmaking power is entitled to much weight and in this statute the intention is expressly declared to impose a special excise tax.* * * *"

The criterion here set out which enables the court to disre-

gard the express language of a statute and declare the tax to be of a nature different from that set out in the act is that "it is apparent that it cannot be so designated consistently with the meaning and effect of the act." The act levies a specific tax on a specific article or substance for a specific purpose. The tax is not based on value. Value does not enter into the calculation of the tax. The same tax is levied on each barrel of oil, wherever produced in the State of Oklahoma, without regard to its gravity, to its gasoline, or other content. If a barrel of oil produced is worth 50 cents a barrel and a barrel produced in another locality, owing to its gravity and gasoline and other content, is worth $1.00 a barrel, the tax paid on each barrel is the same. The tax levied, when collected, does not go into the general revenues of the state and is not applied to general state purposes, but is only to be applied to the purpose of liquidating the expense of administering the Proration Act of the State of Oklahoma. Thus the act has every earmark, bears every indicia of an excise tax as such tax is defined and individualized in dictionaries and is described, defined and delimited in the opinions of the courts differentiating between excise and other taxes. The legislature was not only right in labeling and declaring the tax levied to be an excise tax, but used the term with precision and the act discloses that the legislative intention was to create for a limited period, an excise tax and not a production tax, discloses that it was the design of the legislators to create a tax that would be in addition to the gross production tax, a tax to be applied to different purposes than the gross production tax, to be handled in a different manner and to be deposited in a different fund from the gross production tax.

As to the kind of tax it was, the court below said (R. 26):

> "In considering this cause, and at the outset, we are met with the question whether this tax of 1/8 of one cent per barrel is or is not an 'Excise Tax.' It was denominated an 'Excise Tax' by the Legislature in the body of the Act levying the tax, and in the title thereto, and while the designation of a tax is not necessarily controlling as to what is the nature and character of the tax, yet this tax is not in any manner based upon the value of the oil taxed applying alike to the most valuable barrel of oil as to the least valuable barrel. This tax is small in amount, and to exist for a limited time only, and for the benefit of a special fund or purpose as distinguished from a general purpose. It therefore bears all the earmarks of an excise tax as distinguished from a property tax, and we conclude that it is in truth and in fact what the Legislature designated it to be, that is, an 'Excise Tax.' *Patton* v. *Brady,* 184 U. S. 608, 46 L. ed. 713; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 55 Law. ed. 389."

This is a decision of the highest state court on the nature and character of the state statute before it for construction and we think determinative of that question. Nevertheless, the court below further held that even if this tax was a gross production tax, it was not the kind authorized by Congress. Which brings us to:

II.

If the Act of 1933 Is a "Gross Production Tax" It Is Not the Kind Authorized by Congress.

By section 5 of the Act of March 3, 1921 (which is the only Act of Congress authorizing a state tax upon oil produced from Osage lands), Congress consented to a certain kind of tax. There are at least four particulars in which

the "excise tax" fails to meet the requirements. Section 5, is as follows:

> "That the State of Oklahoma is authorized from and after the passage of this act to levy and collect a gross production tax upon all oil and gas produced in Osage County, Oklahoma, and all taxes so collected shall be paid and *distributed*, and *in lieu of all other state and county taxes levied upon the production of oil and gas as provided by the laws of Oklahoma*, the Secretary of the Interior is hereby authorized and directed to pay through the proper officers of the Osage Agency, to the State of Oklahoma, from the amount received by the Osage Tribe of Indians as royalties from production of oil and gas, the per centum levied as gross production tax, *to be distributed as provided by the laws of Oklahoma; Provided*, that the Secretary of the Interior is hereby authorized and directed to pay, through the proper officers of the Osage Agency, to Osage County, Oklahoma, *an additional sum equal to 1 per centum of the amount received by the Osage tribe of Indians as royalties from production of oil and gas, which sum shall be used by said county only for the construction and maintenance of roads and bridges therein; Provided, further*, that the proper officials of Osage County shall make an annual report to the Secretary of the Interior showing that said fund has been used for road and bridge construction and maintenance only." (Italics ours.)

The four requirements which are necessary in order to comply with the conditions laid down by Congress to permit application of the tax are the following:

(1) There must be only one "gross production tax." Not two or more.

(2) The tax must be distributed—that is, it must go to several purposes and not to only one.

(3) The tax must be "in lieu of all other state and county taxes levied upon the production of oil."

(4) It must be a per centum tax upon the value of the oil—the equivalent of an ad valorem tax upon the leasehold, equipment and production—not a flat tax per barrel.

All of these are lacking in the "excise tax." We will discuss them in their order:

(1) *There must be only one "gross production tax." Not two or more.*

Congress consented to "a gross production tax." It did not consent to gross production *taxes.* This court had held in 1918 and 1919 that the Oklahoma Gross Production Tax Law of 1916 was invalid as applied to Osage oil production *(Howard* v. *Oil Companies; Large Oil Company* v. *Howard, supra).* Congress very apparently, as a result of the decisions just cited, intended to consent that the 1916 Act apply to oil produced from Osage lands. At any rate it did not consent to several gross production taxes. It gave permission to levy one tax. It did not consent to two. Two or more gross production taxes are not comprehended in the words,

"a gross production tax."

If these words include two taxes then they include any number. It is not likely that Congress intended to consent to several taxes. The oil leases upon lands in the Osage Nation are made upon terms prescribed by the Secretary of the Interior. They provide for a royalty of 1/5 of the oil produced if the wells on the lease average 100 barrels or more. If the average is less than 100 barrels, the royalty is 1/6. The royalty provided for in commercial leases is uniformly 1/8. Osage leases would be more desirable if production therefrom was not subject to taxation. Congress

might well have had this in mind in consenting to taxation of Osage production. But Congress was quite liberal in this enactment. It not only authorized the State of Oklahoma to levy and collect the customary gross production tax but, in addition, it directed the Secretary of the Interior to pay through the proper officers of the Osage Agency at Pawhuska, Oklahoma,

> "an additional sum equal to one per centum of the amount received by the Osage Tribe of Indians as royalties from production of oil and gas, which sum shall be used by said county only for the construction and maintenance of roads and bridges therein."

Osage County is the only county in Oklahoma which receives a benefit of this kind. The tax authorized by Congress was such a one as would be "in lieu of all other state and county taxes levied upon the production of oil and gas." Necessarily, there could be only one such tax. If a tax is to be "in lieu" of all others there could be only one tax.

Congress clearly intended to consent to only one tax and that was to be in accordance with certain specifications. One of these was:

(2) ***The tax must be distributed—that is, it must go to several purposes and not to only one.***

The "excise tax" is not to be "distributed." All the money collected is to go to one purpose. All money collected must go in a "separate and distinct fund to be known as the 'Proration Fund'." The permissive Congressional Act requires of the gross production tax authorized to be levied and collected, that it be "distributed * * * as provided by the laws of Oklahoma." In passing the permissive act Congress undoubtedly had in mind the

Act of 1916 which this court had held invalid as applied to Osage production. It was undoubtedly the tax prescribed by the 1916 Act, or certainly a tax of that kind, which Congress had in mind. The 1916 Act required the tax to be "levied and collected for the following specific purposes":

> "*(1)* For current expenses of state government: Two-thirds.
>
> "*(2)* For and in aid of the common schools of the county from whence the oil or gas and other mineral is produced, one-sixth (five mills).
>
> "*(3)* For and in aid of the construction of permanent roads and bridges of the county from whence the oil or gas and other mineral is produced, one-sixth (five mills).",

and the State Auditor, whose duty it was to collect the tax, was directed to make distribution accordingly. So we say that when Congress required that the gross production tax it authorized must be one that would be distributed in accordance with the laws of the State of Oklahoma, it meant a tax which would be used for the general expenses of state government, common schools and roads and bridges.

But the excise tax is not to be "distributed." The word "distribute" means, according to Funk and Wagnall's Dictionary, the following:

> "To give out or divide among a number; share or parcel out; dispense; apportion; as to distribute alms."

This is the definition used in legal decisions. In *Young* v. *Sinsabaugh,* 173 N. E. 784 (Ill.), appears the following:

> "The definition of the word 'distribute' as found in Webster's New International Dictionary is to divide among several or many; to deal out; apportion; allot. In the Century Dictionary, the definition is to divide or parcel out; allot in shares; bestow in parts or shares,

or in due proportion; apportion; divide among several; as, Moses distributed lands to the tribes of Israel."

The "excise tax" of 1/8 of one cent a barrel is not to be distributed. All funds derived from the tax are to be placed in "a separate and distinct fund to be known as the 'Proration Fund'." And all money derived is to be expended in administration of the proration laws. This is covered by section 2 which in part provides:

"PRORATION FUND—USE OF MONEY CONSTITUTING.

Section 2. All funds derived from the levy of the tax of one-eighth of one cent per barrel on petroleum oil produced in the State of Oklahoma shall be deposited in the State Treasury to the credit of a *separate and distinct fund* to be known as the 'Proration Fund.' All moneys in said fund are hereby appropriated, and shall be used for the payment of salaries and expenses"——

of the proration umpire, etc.

The majority opinion of the court below quite adequately covered the point we have been attempting to make. It said (R. 27):

> "The money collected for gross production tax is distributed two-thirds for current expenses of state government, and the remaining one-third is distributed one-half to the common schools of the county where the oil is produced, and one-half in aid of the construction of permanent roads and bridges of the county where the oil is produced, while the money collected for the one-eighth of one cent excise tax is not distributed in general over the state, nor is any of it restricted to or required to be expended in the county where the oil is produced, but on the contrary, this money goes into the 'proration fund' and is used to pay expenses of maintaining and enforcing proration only in and for those pools or common sources of supply of oil where the conditions are such that the full production

of oil from that common source of supply cannot be taken without constituting waste. Considering the differences in the method of levying of the gross production tax and the excise tax here under consideration and the different method of distribution of the gross production tax collections and the excise tax collections, Congress might well have consented to the imposition of the gross production tax in the language above quoted from the Congressional Act, without having any inclination or intention of consenting to the imposition of such a tax as the excise tax here under consideration. As regards the matters here under consideration, the duty, purpose and policy of the United States Government was to look after and provide for the general well being of the Osage Indians, and provide for the care and protection of their property. The Congress might well have observed and considered the benefits that would be received by the Osage Indians in Osage County, Oklahoma, by the collection of the gross production tax and the expenditure thereof in the method and for the three purposes provided in that act. The same federal authority might not observe such benefits as would justify the government in consenting to this excise tax on the oil produced from the Osage Indian lands. This proration fund may or may not be expended in Osage County. There may be but few common sources of supply in Oklahoma to which the proration law would apply, in which event all collections of this excise tax would be used in the enforcement of the proration law in and for those pools or sources of supply which come within the provisions of the proration law. Such pools or sources of supply may of course decrease in number and may be far removed from the Osage Indian lands. The enforcement of this act, however beneficial to those common sources of supply where it is applicable, and however beneficial indirectly in and to other oil fields, might or might not in the opinion of governmental authorities be beneficial to the wards of the government, the Osage Indians.

The Congress might or might not consent to the levy and collection of this excise tax.

"Congress might have withheld consent to the levy and collection of any state tax on these government instrumentalities. The State of Oklahoma thus far has withheld consent to the collection of federal taxes on similar state instrumentalities, and the objections to such federal taxes as constituting burdens on state instrumentalities has been sustained. *Burnett* v. *Coronada Oil & Gas Co.*, 285 U. S. 393, 76 Law. ed. 815."

It seems clear that the "excise tax" does not meet the requirement of Congress that the tax be "distributed." It falls equally short in another particular, which is:

(3) *The tax must be "in lieu of all other state and county taxes levied upon the production of oil."*

The congressional act required that the permitted tax must be

"in lieu of all other state and county taxes levied upon the production of oil and gas as provided by the laws of Oklahoma."

There is no "in lieu of" provision in the "excise tax." The tax it levied was in addition to the tax upon value levied by the 1916 Act. It is, therefore, without the language of and in opposition to, a requirement of the permissive act.

The dissenting opinion below did not advert to the "in lieu of" requirement. Nor do petitioners in their brief. It seems to us absolutely decisive.

At the time the permissive act was passed, and at the time the "excise tax" law of 1933 was enacted, the Oklahoma Gross Production Tax Law of 1916 was in effect. It levied a tax equal to

"3 per centum of the gross value of the production of petroleum * * *,"

which was provided in the act to be

"in full and in lieu of all taxes by the state * * * upon any property rights attached to or inherent in the right to said minerals * * *; *and also upon the oil* * * *."

This gross production tax of 1916 was based upon value and was to be "in lieu of" all other taxes upon, among other things, the oil produced. The "excise tax" of 1/8 of 1 cent per barrel is not a tax based upon value. Each barrel of oil is taxed at the same rate without regard to value. In Oklahoma the price of oil per barrel varies according to its gravity. The lowest gravity covered in the posted prices of the purchasing companies is 25 degrees and the highest 40 degrees, and there is a differential of 2 cents per barrel for each degree of gravity from the lowest to the highest. The tax of 1/8 of 1 cent per barrel is an entirely different kind of tax than provided by the 1916 Act which levied a tax equal to

"3 per centum of the gross value."

Congress authorized a single tax upon Osage oil production which was to be "in lieu of" all others as provided by the laws of Oklahoma. Since the excise tax does not purport to be exclusive of other taxes upon production of oil, how can it be held that Congress consented to it? It is an additional tax and is not "in lieu of" any other tax. Surely Congress consented to only one tax. If the tax of 1/8 of 1 cent per barrel operates it must be in lieu of all other taxes "upon production" and it would result that the per centum tax on value would become inoperative. Petitioners say in their brief that the excise tax is merely "an addi-

tional gross production tax." But if it is that does not help any. On the contrary, it clearly puts them out because Congress consented to only one tax, since the tax it authorized was required to be "in lieu of" all other taxes levied by the state upon the production of oil. The tax of 1/8 of 1 cent per barrel is a tax "upon the production of oil." It is not "in lieu of" the per centum tax upon the value of the oil. Hence, it is not permitted to apply to Osage oil because it does not meet the condition imposed by Congress that such a tax upon production must be "in lieu of" all others.

The meaning of the words "in lieu of" has been judicially construed many times. In *Hunter* v. *City of Memphis*, 26 S. W. 828 (Tenn.), a statute required payment by insurance agents of a privilege tax which was provided to be "in lieu of all other taxes." As to the meaning of the quoted words the court said such privilege tax

> "is a positive exclusion of every other privilege tax. The phrase has no other office or meaning."

So here the value tax which contains the "in lieu of" provision is a "positive exclusion of" the "excise tax."

The "excise tax" does not meet one of the prerequisites which Congress laid down that the tax must be

> "in lieu of all other state and county taxes levied upon the production of oil and gas as provided by the laws of Oklahoma."

There is still another respect in which the 1/8 of 1 cent per barrel tax does not come within the specific restrictions or qualifications imposed by the Act of Congress. It is:

(4) ***It must be a per centum tax upon the value of the oil—the equivalent of an ad valorem tax upon the leasehold, equipment and production—not a flat tax per barrel.***

Prior to the passage of the permissive act of March 3, 1921, this court decided *Shaffer* v. *Carter, supra* (March 1, 1920). In the opinion in such case this court said that the Oklahoma Gross Production Tax Law of 1916 was intended

"as a substitute for the ad valorem property tax."

In essence the law of 1916 is a property tax, is in effect an ad valorem tax on the mineral interest in the land, the production therefrom as produced, and the equipment necessary to produce it, procured by a percentage tax upon the value of the gross production. This for the reason that such act provides for adjustment of the percentage rate upon the value of the production so as to conform in result to what would be paid upon an ad valorem basis. This is covered in section 1 of the act, as follows:

> "The State Board of Equalization, upon its own initiative, may and upon complaint of any person who claims that he is taxed too great a rate hereunder, shall, take testimony to determine whether the taxes herein imposed are greater, or less than the general ad valorem tax for all purposes would be on the property of such producer subject to taxation in the district or districts where the same is situated, including the value of oil, gas or mineral lease, or of the mining or mineral rights, the machinery, equipment or appliances used in the actual operation of, in and around any such well or mine, the value of the oil, gas, asphalt or any of the said mineral ores produced and any other element of taxable value in lieu of which the tax herein is levied. The said board shall have power and it shall be its duty to raise or lower the rates herein imposed to conform thereto."

In passing the permissive act, Congress undoubtedly (as is shown by the contents of the act) was familiar with the provisions of the Oklahoma Gross Production Tax Law of 1916. It was to permit operation of such tax law that the permissive act was passed. When, in the act, Congress consented to the levy by Oklahoma of "a gross production tax" to be "distributed" and to be "in lieu of all other state and county taxes levied upon the production of oil and gas as provided by the laws of Oklahoma," it must have had in mind specifically the method of distribution, the "in lieu of" feature and the other provisions of the 1916 Act. It, therefore, knew that the 1916 law provided for a percentage tax upon gross value. It is presumed to have known of this court's decision in *Shaffer* v. *Carter, supra,* wherein it was said that this gross production tax was intended "as a substitute for the ad valorem property tax." It knew that in effect the tax was a property tax. By the very terms of the 1916 Act the tax was one based upon value. Congress knew that. So Congress consented to the kind of tax embodied in the 1916 Act—a tax on value and a substitute for the ad valorem tax. The Act of 1933 imposing a tax of 1/8 of 1 cent per barrel does not fit in as a tax upon value or as a substitute for the ad valorem property tax. It does not take the value of the oil into consideration. It is a tax per barrel without regard to quality or value. It is not the kind of a tax which was consented to by Congress. The tax consented to imports a tax upon value, the equivalent of an ad valorem tax and containing a provision authorizing the lowering or raising of the per centum of value rate to make the amount collected conform to what would be realized from an "ad valorem tax for all purposes." If the tax levied by the "excise tax" law, in addition to the per centum

of value tax, exceeded the value of the mineral rights, *et cetera*, there would be no means whereby the tax could be reduced to make the taxes the equivalent of the ad valorem rate.

Summarizing our argument under Heading II, we say that Congress did not consent to the tax of 1/8 of 1 cent per barrel, because such tax is not an exclusive tax in lieu of all others. Because it is not to be "distributed" but must be devoted to the expenses incurred for a particular purpose, and because it is not a per centum tax on value, the equivalent of an ad valorem tax with provision for adjusting the rate to conform to the ad valorem rate—but is laid without regard to value.

Conclusion.

Congress was quite liberal in the permissive act of March 3, 1921. At that time much of the land of the Osage Indians had not been leased for oil. Congress realized, of course, that when leases on the unleased lands were sold, they would bring more money to the Osage Tribe if the oil produced therefrom would not be subject to the Oklahoma Gross Production Tax Law. It deprived the Indians of this benefit for the advantage of the state generally and Osage County. It not only permitted application of the gross production tax, but directed the Secretary of the Interior to cause to be paid "an additional 1 per cent of the amount received by the Osage Tribe of Indians as royalties" to Osage County, Oklahoma, for the construction and maintenance of roads and bridges.

A state cannot tax a federal agency at all without the consent of Congress. It has no power at all, of itself, in

that regard. So, of course, there is no presumption in favor of such taxing power of the state. Permission to tax must be found in some Act of Congress. We think the majority opinion in the court below was absolutely correct wherein it says (R. 28):

> "Our state should freely act in the levy and collection of a tax on national governmental instrumentalities, which is consented to by the National Government, but we should be slow to presume upon consent given, and careful to remain within the limits of the acquiescence or the consent heretofore given, and we should not create or presume the right to levy and collect one tax because the National Government has consented to the levy and collection of another and a different tax. Under the permissive Act of Congress we have levied and collected the gross production tax which was authorized and permitted, and further than that we cannot go with other taxes until and unless that government should itself extend the consent and permission heretofore granted. That governmental consent cannot be extended or enlarged upon by the state legislature, and should not be by this court."

In petitioners' brief and in the dissenting opinion in the court below reference is made to *Gypsy Oil Company* v. *Oklahoma Tax Commission,* 6 Fed. Supp. 6. We think the mind of the court there was chiefly centered upon the question of jurisdiction and that it only incidentally considered the merits.

Congress consented to the collection of "a gross production tax," of a certain kind. It did not consent to the tax of 1/8 of 1 cent per barrel because it is of another and different kind. The excise tax was a temporary tax. A decision here will have no application outside of Oklahoma. We respectfully submit that the decision of the court below

was obviously correct and that the application for writ of *certiorari* should be denied.

Respectfully submitted,

EDWARD H. CHANDLER,
JAMES B. DIGGS,
R. W. GARRETT,
WM. H. ZWICK,
L. G. OWEN,
Counsel for Respondents.

JOE DICKERSON,
Of Counsel.

OPINION

SUPREME COURT OF THE UNITED STATES.

No. 116.—October Term, 1935.

State of Oklahoma ex rel, Oklahoma Tax Commission, H. L. McCracken, Chairman, et al., Petitioners,
vs.
Barnsdall Refineries, Inc., The Carter Oil Company, Champlin Refining Company, et al.

On Writ of Certiorari to the Supreme Court of the State of Oklahoma.

[January 6, 1936.]

Mr. Justice Stone delivered the opinion of the Court.

This case presents the single question whether an Oklahoma tax of ⅛ of a cent per barrel on oil produced in the state, c. 132, Oklahoma Session Laws, 1933, when applied to oil produced by lessees of lands of the Osage Tribe of Indians in Osage County, Oklahoma, is within the congressional enactment consenting to a state tax upon the production of such oil. The challenged tax is paid into the State Treasury and used to defray the expenses of administering the State Oil and Gas Proration Law. The Oklahoma Supreme Court held that the tax is not within the congressional consent and accordingly enjoined its collection as imposing an unconstitutional burden on the Indian leases, which are deemed to be instrumentalities of the federal government. 171 Okla. 145. We granted certiorari, — U. S. —, to review the judgment of the state court, the case being of public importance because involving relations of the state to the national government.

The Oklahoma legislature, by Act of February 14, 1916, c. 40, Okla. Session Laws, 102, imposed a production tax of 3% of the gross value of all oil produced within the state. The Act provides that the tax shall be in lieu of all other taxes upon oil in place in the ground, oil leases, or equipment used for oil production, and that one-third of the tax collected in each county shall be returned to it for the construction of permanent roads and bridges and "for and in aid of" the common schools. The levy is denominated by the taxing act a "gross production tax," a label which this Court

and the Supreme Court of Oklahoma have accepted as appropriate. *Gillespie* v. *Oklahoma*, 257 U. S. 501, 504; *Barnsdall Refineries, Inc.* v. *Oklahoma Tax Commission, supra*, 147.

In *Howard* v. *Gypsy Oil Company*, 247 U. S. 503, and *Large Oil Co.* v. *Howard*, 248 U. S. 549, this tax was held invalid so far as applied to the production of oil by lessees of lands of the Osage Tribe of Indians, which were located in Osage County, as a tax burden upon instrumentalities of the United States. See *Indian Territory Illuminating Oil Co.* v. *Oklahoma*, 240 U. S. 522; *Gillespie* v. *Oklahoma, supra*; compare *Group No. 1 Oil Corporation* v. *Bass*, 283 U. S. 279; *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393.

These decisions were followed by the Act of Congress of March 3, 1921, 41 Stat. 1250, Section 5[1] of which authorized the State of Oklahoma to levy a tax upon the gross production of oil in Osage County, with the proviso that ". . . all taxes so collected shall be paid and distributed, and in lieu of all other state and county taxes levied upon the production of oil and gas as provided by the laws of Oklahoma, ..." Other sections of the act permitted the extension, by an additional twenty-five years, of the period, expiring in 1931, for which mineral leases of the lands of the Osage Indians might be granted by the Secretary of the Interior acting in their behalf.

Congress, in enacting the legislation, was advised of the Oklahoma 3% gross production tax, of the decisions of this Court holding lessees of Indian oil lands, which were located in Osage County, immune from the tax, and that removal of the immunity would benefit the Osage Indians through the return of one-third of the

[1] "Sec. 5. That the State of Oklahoma is authorized from and after the passage of this Act to levy and collect a gross production tax upon all oil and gas produced in Osage County, Oklahoma, and all taxes so collected shall be paid and distributed, and in lieu of all other State and county taxes levied upon the production of oil and gas as provided by the laws of Oklahoma, the Secretary of the Interior is hereby authorized and directed to pay, through the proper officers of the Osage Agency, to the State of Oklahoma, from the amount received by the Osage Tribe of Indians as royalties from production of oil and gas, the per centum levied as gross production tax, to be distributed as provided by the laws of Oklahoma: *Provided*, That the Secretary of the Interior is hereby authorized and directed to pay, through the proper officers of the Osage Agency, to Osage County, Oklahoma, an additional sum equal to 1 per centum of the amount received by the Osage Tribe of Indians as royalties from production of oil and gas, which sum shall be used by said county only for the construction and maintenance of roads and bridges therein: *Provided further*, That the proper officials of Osage County shall make an annual report to the Secretary of the Interior showing that said fund has been used for road and bridge construction and maintenance only."

tax to the county. See Hearings before Committee on Indian Affairs, S. 4039 (particularly letters of the Secretary of the Interior and of the Indian Commissioner to the Chairman of the Committee), Part 1, pp. 7, 8; Part 2, pp. 108, 109; Report Senate Committee on Indian Affairs, No. 704, 66th Cong., 3rd Sess. As originally introduced the bill authorized the levy of a gross production tax upon oil produced in Osage County "not to exceed 3 per centum of the value of the same", and directed that it should be "distributed as now provided by the laws of Oklahoma." With the evident purpose of removing the 3% limit but not of otherwise altering the character of the permitted tax, the 3% limitation was stricken from the bill before enactment.

Congress, in removing the tax immunity, thus had in contemplation the particular tax then on the statute books of Oklahoma, then and ever since described as a gross production tax, the benefits of which would inure to Indians in Osage County by the distribution of a part of the tax to that county. The section bears its own evidence of the intention that the waiver of tax immunity of the production of oil from Indian lands was to be limited to a tax having these characteristics. The tax is described as a gross production tax. It is to be "paid and distributed, and in lieu of all other state and county taxes levied upon the production of oil and gas as provided by the laws of Oklahoma, . . ." The reference must be taken to be to the laws then in effect, unless we are to indulge the improbable assumption that the state was to be left free to dispense with the requirement that the tax permitted was to be in lieu of all other taxes. This conclusion seems inescapable, despite the amendment of the bill as introduced by dropping the word "now" from the direction that the tax is to be "distributed as now provided by the laws of Oklahoma," since in the section as amended the phrase is used to qualify the "lieu" provision of the statute as well as the payment and distribution provisions. The section removing the immunity thus described the gross production tax then on the statute books, which was by the taxing act declared to be in lieu of all other taxes upon the oil leases, with which Congress was particularly concerned. Moreover, the Secretary is directed to pay from Indian funds "the per centum" levied as a gross production tax "to be distributed as provided by the laws of Oklahoma" and to pay to the county for road and bridge construction "an additional sum" equal to one

per cent of the oil royalties received upon the Osage Indian leases, the latter sum evidently being in addition to the amounts to be received by the county upon distribution of the gross production tax.

We think that the cumulative effect of the words of the section, obscure until read in the light of its history and of the situation to which it applied, is persuasive that the permitted tax is, as was the then existing tax, one to be measured by the gross value of the oil produced, and to be distributed in part to the counties and thus to be of benefit to the Indian owners of lands in Osage County.

In these particulars the tax of ⅛ of a cent per barrel of oil produced does not conform to the congressional consent. The taxing act does not, as required by the permissive Act, levy a per centum gross production tax in terms of value, and, more important, it provides that the entire tax levied for the period from the effective date of the Act of 1933 to June 30, 1935, is to be used to pay the expenses of state officials authorized by the state "proration law" to apportion and control oil and gas production in such manner as to prevent waste by producers drawing from a common source or pool. No part of the proceeds of the tax is required to be paid to the counties, and the benefits of proration depending upon the existence of a common source drawn upon by different producers, would not necessarily extend to any particular county.

The Supreme Court of Oklahoma emphasized the fact that the ⅛ of a cent per barrel tax, denominated by the statute an "excise", is an excise tax distinguishable from a property tax in lieu of which the gross production tax is levied, and different from the gross production tax in its temporary character and the method of its computation and distribution, and so concluded that it is not a tax contemplated by the congressional consent. Construing that consent with the strictness appropriate to the interpretation of a waiver of a defined tax immunity of the sovereign, we think the conclusion of the state court was right.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.